

**DISSENTING STATEMENT
OF
COMMISSIONER SUSAN NESS AND COMMISSIONER GLORIA TRISTANI**

Re: Applications of Pine Bluff Radio, Inc. and Seark Radio, Inc. File Nos. BAL-970103EA, BALH-970103EB, BALH-970103EC

In the Telecommunications Act of 1996, Congress directed the Commission to relax its caps on local radio ownership. The Commission has faithfully executed that directive and will continue to do so. But Congress also set clear limits on the level of permissible consolidation. For instance, an entity may own, operate or control only up to 8 stations in the largest markets, and no more than 50% of the stations in the smallest markets.¹ We have previously described how our current method of applying the local radio ownership caps may hamper our ability to carry out Congress' intent.² In particular, for purposes of counting the number of stations contributing to "the market," we count any station whose principal community contour intersects with *any* mutually overlapping station in the proposed combination. But then when counting the number of stations a particular entity may own within that market, we shrink "the market" to only those stations that overlap with *every* station proposing to have common ownership.³ The end result is that there can be no meaningful assessment of market concentration because there is no consistent definition of the relevant market.

Until this case, we were content to point out this problem and urge that it be fixed as part of the biennial review process. Here, however, the Commission's illogical counting method cannot be countenanced because it produces a result contrary to Congress' express directive that:

in a radio market with 14 or fewer commercial radio stations, a party may own, operate, or control up to 5 commercial radio stations, not more than 3 of which are in the same service (AM or FM), except that a party may not own, operate, or control

¹See 1996 Act, Section 202(b)(1).

²See *Joint Statement of Commissioners Susan Ness and Gloria Tristani, Station KBYB(FM), El Dorado, Arkansas*, 13 FCC Rcd 15685 (1998).

³Notably, the Commission's practice of shrinking the market when assessing the number of stations that will count against the cap has never been codified as a Commission rule. Thus, when Congress directed the Commission to change its rules, the only market definition rule it had before it was the rule defining the total number of stations "in a market." See 47 CFR § 73.3555(a)(4)(ii).

more than 50 percent of the stations in *such market*.⁴

Thus, the plain language of Congress' directive requires us to look at the *same market* -- i.e., to use the same definition of "market" -- when determining the number of radio stations in the market and when counting the number of stations that an entity owns, operates, or controls within that market.⁵

Here, two of the three "markets" identified by the majority appear to violate Congress' 50% ceiling. Market 2, according to the majority, is formed by the mutually-overlapping stations KPBQ(FM) and KXFE(FM), both to be owned by Seark. (See maps attached hereto.) There are 9 other stations that "contribute" to the market. Seark will own 4 of these. Thus, if the "market" were defined as comprising those 11 stations, Seark would own 6 of them (54.5%) and exceed the 50% limit.⁶ The majority relies on different definitions of the relevant "market" when counting the total number of stations in the market and for counting the number of stations that Seark will own within the market. Because this inconsistent definition appears to result in an approval that is at odds with the statute, we respectfully dissent.⁷

Not only does the Commission's approach violate the plain language of the 1996 Act, it also makes no analytical sense. If a station has sufficient presence that it should be counted

⁴1996 Act, Section 202(b)(1)(D) (emphasis added).

⁵ Contrary to the Chairman's suggestion, we should not ignore Congress' directive to apply a single definition of "market" in cases such as this until the conclusion of a future rulemaking. Indeed, *we have already amended our rules* to reflect Congress' directive. While the Commission still retains the discretion to decide *which* single-market definition to apply, it therefore no longer has the discretion to decide *whether* to apply a single-market approach. Nevertheless, we welcome the Chairman's commitment to examine the market definition issue. We are, however, concerned about timing. The illogical results caused by our current approach cannot be allowed to continue unchecked. We look forward to initiating and completing a rulemaking at the earliest possible date.

⁶Likewise, if the "market" were defined as only mutually-overlapping stations, the Act would appear to be violated because Seark would own 2 of the 3 (67%) stations in the market (i.e., it would own both KPBQ and KXFE but not KOLL(FM)).

⁷ Similarly, according to the majority, Market 3 consists of KDDA(AM) and KXFE(FM), to be owned by Seark, as well as two other stations that "contribute" to the market (KPBQ and KOLL). Since Seark will own KPBQ, it will own either three of four stations (75%) if the "market" were consistently defined as including all stations that contribute to the market, or two of two stations (100%) if the market were consistently defined as mutually overlapping stations. Either way, it appears that this transaction would violate Congress' 50% limit.

as contributing to the number of stations "in the market," it also has a sufficient presence that it should count as being "in the market" for purposes of calculating the ownership cap. It should be one or the other. Either it counts or it does not. But it makes no sense to count them for one purpose and not for the other, as we currently do. The resulting ratio is meaningless because the numerator and the denominator share no common baseline. Congress implicitly understood this and crafted the 1996 Act accordingly. It's time for the Commission to stop this shell game and apply the rules that Congress gave us.



+ KOLL(FM)

+ KIPR(FM)

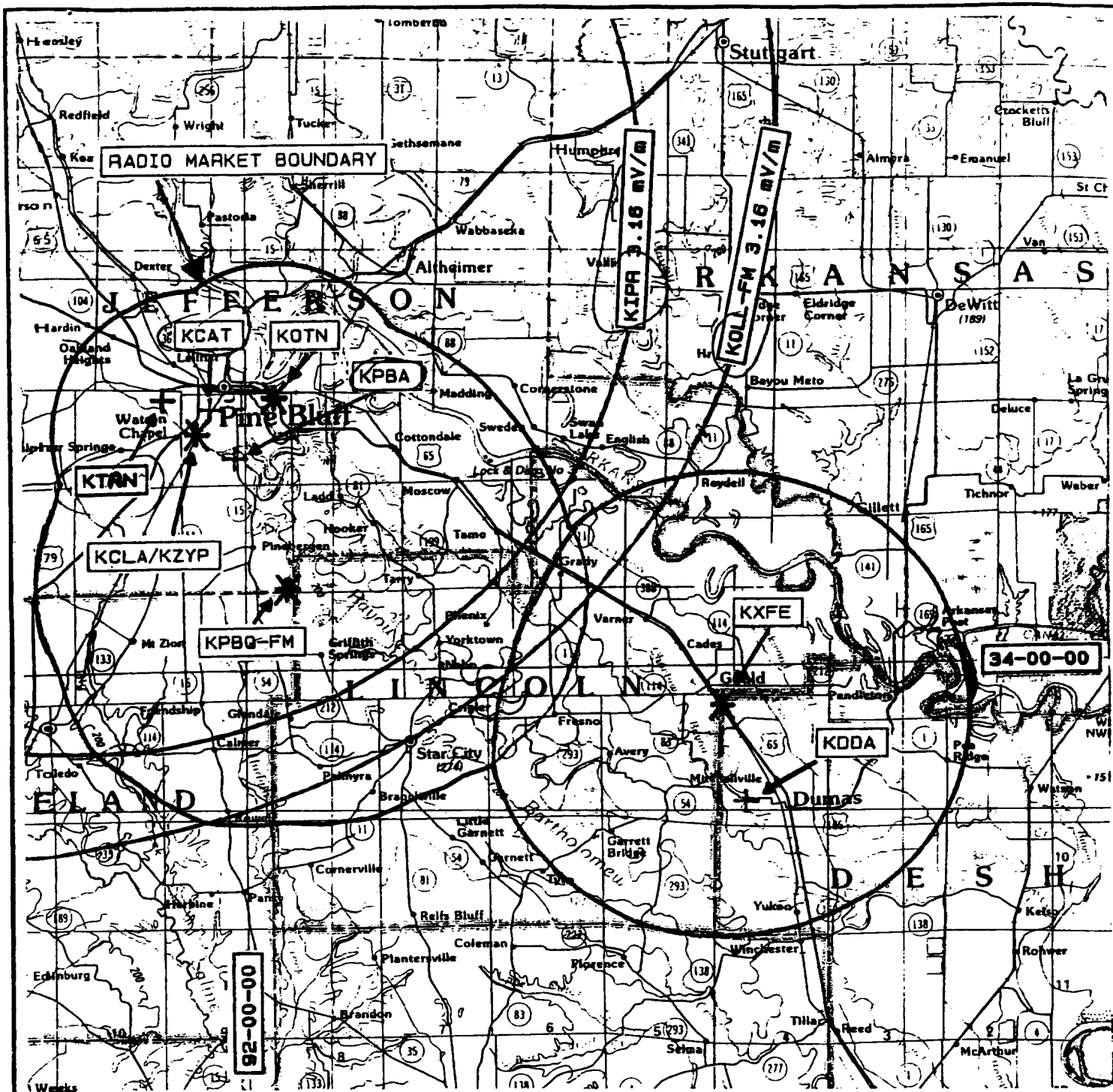
+ KTRN(FM) + KOTN
+ KCAT
+ KZYP(FM)/KCLA
+ KPBA

+ KPBO(FM)

+ KXEE

+ KI

Title: MAP
Engineer: William G. Ball, P.E.
Date: Thu Apr 8 06:50:22 1999
Projection: Lambert
Scale Factor: 3.33 km/cm
Projection Coordinates: 34 24 44 N 92 7 32 W



STATIONS IN RADIO MARKET

MAP IS A PORTION OF THE 1: 500, 000 SCALE
U.S.G.S. BASE MAP OF ARKANSAS.

BLACK CONTOURS ARE FM STATIONS.
RED "+" ARE AM STATIONS.
BLUE "*" ARE SUBJECT STATIONS.

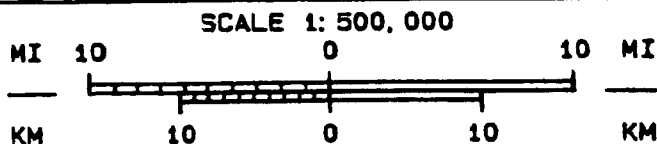


EXHIBIT #2

RADIO MARKET ANALYSIS
SEARK RADIO, INC.
KCLA/KZYP/KPBQ-FM RADIO
PINE BLUFF, ARKANSAS

December 1996

GRAHAM BROCK, INC.

BROADCAST TECHNICAL CONSULTANTS